

*a***CRYSTAL REALTY SDN BHD****v.****HONG LEONG BANK BERHAD***b*

HIGH COURT SABAH & SARAWAK, KUCHING
LAU BEE LAN J
[SUIT NO: 22-41-2003-11]
2 DECEMBER 2005

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CIVIL PROCEDURE: *Costs - Security for costs - Test to be applied - Ability to pay costs - Credible evidence - What constitutes - Interest bearing account - Responsibility of - Repayment of costs to successful litigant - When to be paid - Rules of the High Court 1980 O. 23, 56 - Companies Act 1965 s. 351*

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CIVIL PROCEDURE: *Appeal - Decision of deputy registrar - Amendment of registrar's order - Discretion of court*

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Vide encl. 21 dated 18 September 2003, the defendant obtained an order from the learned deputy registrar granting the defendant amongst other things security for their costs against the plaintiff and a stay of the plaintiff's action pending such security being given by the plaintiff ("said order"). The plaintiff appealed by way of encl. 67 pursuant to O. 56 Rules of the High Court 1980 which is the subject matter before this court. The sole issue that arose for consideration was whether there was credible evidence tendered by the defendant to show that the plaintiff would be unable to pay the defendant's costs should the

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Held (allowing the plaintiff's application in encl. 67 and setting aside the said order with costs):

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[1] Having considered the plaintiff's corporate information as per exh. WPS1 pertaining to its issued and/or paid up share-capital, the company charges including those held by Pengurusan Danaharta Nasional Berhad and the balance sheets and profit and loss account for the financial years 1998 to 2002 *vis-a-vis* the plaintiff's statement of accounts with Malayan Banking Berhad from April 2003 to September 2003, exh. TBC-15 and with RHB Bank Berhad from May 2003 to September 2003, exh. TPC-16, I conclude that it cannot constitute credible evidence that the plaintiff company will be unable to pay its costs if the defendant succeeds in defending the plaintiff's claim. (p. 73 e-f)

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- [2] The assets and liabilities ratio of the plaintiff company shows that the plaintiff company is slowly but surely [pulling] itself out from the late 90's economic crisis/slump that hit many companies in this country including the plaintiff company. From the tables drawn by the defendant, I find that it shows credit amounts which are definitely more than the security for costs prayed for by the defendant which in turn shows that the plaintiff will have more than sufficient means to meet the defendant's alleged costs of RM40,000 should the defendant succeed in their defence. (p. 74 b & g-h) a
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- [3] Even if there is evidence to show that the plaintiff will be unable to pay the costs of the successful defendant, the court should exercise its discretion against ordering security for costs. (p. 75 f-g) c
- [4] The court took cognizance that the sum of RM40,000 was deposited into court by the plaintiff pursuant to the said order. Since the decision is now in favour of the plaintiff, the court will exercise its discretion and vary the said order by inserting the words "to be paid forthwith" after the words "unless otherwise agreed". (p. 76 c-d) d

Case(s) referred to:

Concord v. Anthony Motors (Hutt) Ltd (No 2) [1977] 1 NZLR 516 (refd)
Skrine & Co v. MBf Capital Bhd & Anor & Other Appeals [1998] 3 CLJ 432 CA (refd) e

Legislation referred to:

Companies Act 1965, s. 351(1)
Rules of the High Court, O. 23 r. 1, O. 56 f

Other source(s) referred to:

Malaysian High Court Practice, 2001 Desk edn, pp. 800-820

For the plaintiff - Su Chua Phin; M/s Griffin Assocs

For the defendant - Victor Ng Yuan Chai; M/s Tang & Partners

Reported by Sharmini Pillai g

JUDGMENT**Lau Bee Lan J:**

Vide a notice of appeal to judge in chambers dated 28 June 2004 pursuant to O. 56 of the Rules of the High Court ("the RHC") (encl. 67), the plaintiff has appealed against the decision of the learned deputy registrar given on 24 June 2004 granting order in terms of the defendant's application *vide* their summons-in-chambers' application dated 18 September 2003 (encl. 21) seeking, *inter alia*, for an order: h
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- a* (i) the plaintiff within seven days from date of the order give security for the defendant's costs of this action by payment of the sum of RM40,000 into court; and
- (ii) the action be stayed until such time as the plaintiff gives such security as provided for in the order.
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The court has considered the defendant's application supported by the affidavit in support of Wong Pak Sing affirmed on 17 September 2003 (encl. 21) and his affidavit in reply affirmed on 28 November 2003 and 26 December 2003 (encls. 34 and 45 respectively), the affidavit in opposition and affidavit in opposition II of Ting Bing Cheong affirmed on 4 November 2003 and 13 December 2003 (encls. 25 and 37 respectively) and the written submissions and written reply of both the learned counsel for the defendant and the plaintiff, Mr. Victor Ng and Mr. Su Chua Phin respectively.

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The plaintiff has submitted that O. 23 of the RHC is not applicable. However, Mr. Ng has submitted that O. 23 of the RHC confers the High Court with the power to grant security for costs and this power is supplemented by s. 351 of the Companies Act 1965 for corporate plaintiffs. Learned counsel also submitted that in this instant case, s. 351 of the Companies Act 1965 (together with O. 23 of the RHC in a complementary manner) applies since the plaintiff is a corporate plaintiff. I agree with the learned counsel and I wish to add that para. 23.1.1 of the *Malaysian High Court Practice* 2001 Desk Edn. at pp. 800-820 states O. 23 r. 1 of the RHC "must be read subject to the powers of the court under any other enactment which requires security for costs (see r. 3). The relevant acts are the Arbitration Act 1965 (Act 93) s. 29, and the Companies Act 1965 (Act 125) s. 351". Further at para. 3 at p. 825 of the same authority (*supra*), it is stated in r. 3 of O. 23 of the RHC as "This order is without prejudice to the provisions of any written law which empowers the court to require security given for the costs of any proceedings".

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The correct approach in the determination of security for costs which is the subject of the defendant's application is enunciated by Gopal Sri Ram JCA in the Court of Appeal in *Skrine & Co v. MBf Capital Bhd & Anor* [1998] 3 CLJ 432. His Lordship at pp. 444 & 445 opined:

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As may be seen, and this is borne out by the authorities decided upon the parallel provisions in other common law jurisdictions, the section provides for a two stage inquiry in the process of arriving at the conclusion as to whether security for costs should be awarded in a particular case in which the plaintiff is a company. *The first step* is for the court hearing an application in this regard to determine whether there is credible evidence. The second step is to ascertain whether that

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evidence, when found to be credible, supports the belief that the company will be unable to pay the costs of a successful defendant ... In our judgment, the correct approach to an application of the nature that forms the subject matter of the appeals before us is that stated by Lord Denning MR in *Sir Lindsay Parkinson & Co Ltd v. Triplan Ltd* [1973] QB 609 where, at p. 626, the Master of the Rolls said:

... the section does not make it mandatory to order security for costs in every case where the plaintiff company appears to be unable to pay the costs of a successful defendant, but that there still remains a *discretion* in the court which may be exercised in *special circumstances*. (Emphasis added)

Therefore, I agree with Mr. Su's submission that in the aforesaid case, the Court of Appeal held that s. 351(1) of the Companies Act 1965 provides for a two stage inquiry in the process of arriving at the conclusion as to whether security for costs should be awarded in a particular case in which the plaintiff is a company; ie, the court has to determine:

- (i) whether there is credible evidence; and
- (ii) whether that evidence, when found to be credible, supports the belief that the company will be unable to pay the costs of a successful defendant.

Having considered the plaintiff's corporate information as per exh. WPS1 pertaining to its issued and/or paid up share-capital, the company charges including those held by Pengurusan Danaharta Nasional Berhad and the Balance Sheets and Profit & Loss Account for the financial years 1998 to 2002 *vis-a-vis* the plaintiffs statement of accounts with Malayan Banking Berhad from April 2003 to September 2003, exh. TBC-15 and with RHB Bank Berhad from May 2003 to September 2003, exh. TPC-16, I conclude that it cannot constitute credible evidence that the plaintiff company will be unable to pay its costs if the defendant succeeds in defending the plaintiff's claim.

The assets & liabilities ratio of the plaintiff company is referred to in para. 27(c) of Ting Bing Cheong's affidavit in opposition as follows:

	Total Assets (RM)	Total Liabilities (RM)	A & L Ratio
1997	29,167,612	64,818,558	0.45
1998	26,830,123	71,366,188	0.38
1999	30,239,428	69,368,731	0.44
2000	34,391,790	47,518,828	0.70
2001	33,296,782	33,664,538	0.99
2002	33,550,659	36,664,462	0.92

- a* It was deposed on the plaintiff's behalf that the plaintiff's actual assets and liabilities ratio are, from accounting, financial and business points of view, growing and getting healthier and stronger and it reflects very well that the plaintiff company has slowly but surely pulled itself out from the late 90's economic crisis/slump that hit many companies in this country including the plaintiff company.
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I agree with the plaintiff's averment that the Assets & Liabilities Ratio of the plaintiff company above shows that the plaintiff company is "slowly but surely [pulling] itself out from the late 90's economic crisis/slump that hit many companies in this country including the plaintiff company".

- c* The defendant has referred to exhs. TBC-15 and TBC-16 as follows:

(a) **Malayan Banking Berhad Account (exh. TBC-15)**

		Total Debits	Total Credits	Ratio
<i>d</i>	(a) April 2003	RM307,141.15	RM646,298.53	2.104
	(b) May 2003	RM373,810.48	RM274,811.16	0.735
	(c) June 2003	RM243,071.50	RM1,254	0.005
	(d) July 2003	RM1,496,062.36	RM1,502,176.01	1.004
<i>e</i>	(e) August 2003	RM447,236.11	RM444,167.31	0.993
	(f) September 2003	RM105,976.44	RM103,203.14	0.974

(b) **Rhb Bank Berhad Account (exh. TBC-16)**

		Total Debits	Total Credits	Ratio
<i>f</i>	(b) May 2003	RM1,774,897.57	RM1,561,553.60	0.880
	(c) June 2003	RM36,667.30	RM0.00	0.000
	(d) July 2003	RM953,058.86	RM934,817.66	0.981
	(e) August 2003 (1st Half)	RM1,537,502.37	RM1,610,734.34	1.048
<i>g</i>	(e) August 2003 (2nd Half)	RM72,243.02	RM0.00	0.000
	(f) September 2003	RM379,048.78	RM380,068.28	1.003

- h* From the above tables drawn by the defendant, I find that in respect of the Malayan Banking Account, there are at least two credits to the tune of RM274,811.16 and RM1,502,176.01 and in respect of the RHB Account, there are three credits namely, RM1,561,553.60, RM1,610,734.34 and RM380,068.28 which amounts are definitely more than the security for costs prayed for by the defendant. Therefore, I agree with the plaintiff's submission that the plaintiff will have more than sufficient means to meet the defendant's alleged costs of RM40,000 if the defendant is successful in its defence.

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Thus, I am of the view that there is no credible evidence tendered by the defendant who bears the onus of proving that the plaintiff is likely to be unable to pay the defendant's costs if the defendant succeeds in defending the plaintiff's claim following the case of *Concord v. Anthony Motors (Hutt) Ltd* (No. 2) [1977] 1 NZLR 516.

Assuming that I err in my finding that there is no credible evidence shown by the defendant, the court will have to determine the second step referred to in *Skrine's* case (*supra*). I am of the view that the grounds submitted by the plaintiff referred to in para. 8 of the plaintiff's written submission dated 30 April 2005 (encl. 94) namely:

- (a) that the plaintiff's claim is *bona fide* and is not a sham;
- (b) the plaintiff has a reasonably good prospect of success; and
- (c) the application for security is oppressive so as to stifle the plaintiff's claim,

has merit. However, with due respect to Mr. Su, I disagree with the submission in respect of plaintiff's contentions that the defendant has (i) on or about 7 May 2002 and 28 June 2002 admitted that money is due to the plaintiff, (ii) that the plaintiff's want of means was caused by the defendant and (iii) that the defendant's application was made at a late stage in the proceedings.

Without prejudice to the court's right to prepare a full grounds of judgment in the event of an appeal, for the reasons above, I hereby reiterate that the defendant has failed to show credible evidence to support its belief that the plaintiff company will be unable to pay its costs if the defendant succeeds in defending the plaintiff's claim and therefore, the defendant's application for security for costs should not be granted. Even if the court is to err on such a finding, and there is evidence to show that the plaintiff will be unable to pay the costs of the successful defendant, I find that the court should exercise its discretion against ordering security for costs. Under the circumstances, I hereby order that the defendant's application dated 18 September 2003 (encl. 21) be dismissed with costs to the plaintiff here (inclusive of the costs of the preliminary objection) and below to be taxed unless otherwise agreed.

Mr. Su then raised the issue of whether the costs to the plaintiff should be paid forthwith since the sum of RM40,000 which was deposited in court by the plaintiff on 1 July 2004 did not bear any interest as it was not deposited into an interest bearing account. The learned counsel argued that the defendant should be aware that even though the plaintiff did not ask for the amount to be deposited into an interest bearing account, the defendant should ask for it

a because it is in the defendant's interest that the amount of RM40,000 including interest would belong to them if they succeed. The learned counsel further argued that the plaintiff would not have lost the interest but for the summons in chambers' application filed by the defendant which the court has now dismissed and the order of the learned deputy registrar has been set aside.

b On the other hand, Mr. Ng submitted that there is no justification for costs to be paid forthwith as it is not the duty of the defendant to ask for the sum of RM40,000 to be put into an interest bearing account but the plaintiff should have requested for it during the hearing before the deputy registrar which they had failed to do so but instead is now attempting to pass the "buck" to the defendant by now saying that the defendant is under a duty to do so.

d The court took cognisance that the sum of RM40,000 was deposited into court by the plaintiff on 1 July 2004 pursuant to the order made by the learned deputy registrar on 24 June 2004. Further, since the decision is now made in the plaintiff's favour, the court will exercise its discretion to vary the order by inserting the words "to be paid forthwith" after the words "unless otherwise agreed".

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